

**U.S. Department of Labor**

Office of Administrative Law Judges  
50 Fremont Street  
Suite 2100  
San Francisco, CA 94105

(415) 744-6577  
(415) 744-6569 (FAX)



**Issue Date: 30 September 2002**

CASE NO. 2000-LHC-2443

OWCP NO. 18-69305

*In the Matter of:*

**JOHN ENGLISH,**  
Claimant,

vs.

**MAERSK PACIFIC, INC.,**  
Employer,

and

**SIGNAL MUTUAL INDEMNITY,**  
Carrier.

Appearances:

Diane L. Middleton, Esq.  
San Pedro, California

For the Claimant

Alexa A. Socha, Esq.  
Long Beach, California

For the Employer and Carrier

BEFORE:                   ALEXANDER KARST  
Administrative Law Judge

## **DECISION AND ORDER DENYING BENEFITS**

John English seeks permanent partial disability and medical benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (the Act), for a scheduled bilateral injury to his wrists and hands, consisting of carpal tunnel syndrome and aggravation of pre-existing arthritic condition, alleged to have arisen from his employment at Maersk Pacific, Inc. He alleges both a specific injury to have occurred on September 26, 1998 by his repeated use of heavy bolt cutters and cumulative trauma in the course of his 15 years of employment as a longshoreman culminating with his exposure to injurious conditions on September 26, 1998. Mr. English claims he became aware that his alleged disability was work related on September 28, 1998 when he was examined by doctors at Kaiser who informed him that he had carpal tunnel syndrome and needed carpal tunnel release surgery on his right hand. He underwent surgery on November 11, 1998 and continues to work as a marine clerk for the Pacific Maritime Association. Mr. English brought this action initially against both Maersk and Container Stevedoring, for whom he worked on September 27, 1998, but he settled the Container claim. The issues for resolution herein include whether injury to the left and right upper extremities arose out of and in the course of employment with Maersk, extent of any permanent injury, and last responsible maritime employer.

### **Summary of Evidence**

#### **Claimant John English**

Mr. English, 64 years old, has been a member of the ILWU Local 13 for about five years. TR 38.<sup>1</sup> He has been employed on the waterfront since 1980. TR 41. He testified that he took all available work including "throwing bananas," signaling, and shoveling. TR 41-42. All jobs performed during this period of time involved repetitive motion of both hands. TR 41-44. Mr. English is a member of the Kaiser health insurance plan and primarily goes to the Harbor City facility. TR 46. He is right-handed, and he lost his right index finger in 1960. TR 82, 88. Mr. English also sustained a rotator cuff injury to his right shoulder in 1990, which required surgery. TR 89.

Mr. English transferred to the marine clerks union in 1997. As a marine clerk, he performed various jobs including tower work, MOD work ("must open doors to inspect materials"), CSF work (container freight station), gate work, and double stack trains (which involved clipping seals). TR 38-40. He works out of the hall, but most of his job assignments have been to either Maersk or Container Stevedoring.

---

<sup>1</sup>The following abbreviations will be utilized herein: TR for transcript of the May 5, 2002 trial; CX for Claimant's trial exhibits; EX for Employer's trial exhibits; LX for transcript of Dr. James London's post-trial testimony; and RX for transcript of Mr. Kurt Ruhland's post-trial testimony.

On September 26, 1998, Mr. English was employed as a marine clerk for Maersk at Dock 270. His job duties included removing shipper seals and putting on high security seals utilizing bolt cutters. He testified that these bolt cutters were 3 to 4 feet long and weighed 50 to 60 pounds. TR 51. Mr. English testified that the weight of the bolt cutters was not printed on them, that he has never weighed the bolt cutters, and no one has ever advised him how much the bolt cutters weigh. TR 115-16. He stated that he had to use these bolt cutters 80 to 100 times in the course of his 8-hour shift to cut seals that were about 3 inches long. TR 52-53, 58. The seal is a steal rod that fits into a steel holder and locks together. TR 54. The rod is about the thickness of a middle finger. TR 55. The security seals that replaced the shipper seals weighed approximately 1/4 pound. TR 57. After clipping the seals, he also had to use a computer to record the numbers of the seals he put on the containers. TR 58. Mr. English estimated he spent half of his work day clipping seals, and the other half inputting numbers in the computer. TR 126.

Mr. English testified that the most difficult part of his job on September 26, 1998 was not squeezing the handles of the cutter to clip seals, but lifting the bolt cutters up to his mouth level to clip. He testified that once the bolt cutters were lifted up, he could rest them on his body and clip. TR 62, 66. He testified the lifting was the most difficult part because of the weight of the bolt cutters, and it put stress on his hands and wrists. TR 161.

By the end of the day on September 26<sup>th</sup>, Mr. English was experiencing numbness, tingling, and sharp pains in both upper extremities. The sharp pain started at the center of the palm and traveled up both arms to the bicep area. TR 59-60. He testified that the numbness, tingling, and pain was “all together” and in both the right and left arm. TR 61. He testified that he never had pain in the center of his palms before using the bolt cutters on September 26, 1998. TR 162. Mr. English stated that this palm pain is what prompted his treating surgeon, Dr. Rajinder Ishkanian, to “take a look” and check for carpal tunnel, and perform the surgery in the palm of his right hand. TR 163. He did not complain to anyone at Maersk about his symptoms at the end of his shift on September 26, 1998. TR 61.

Mr. English testified that the following day, September 27, 1998, he worked for Container Stevedoring as an out gate clerk inside a booth on the dock where trucks passed through the gate. TR 67. His job was to rip a perforated card (interchange), about the thickness of a birthday card, from a printer, verify it against the container on the truck, and give the trucker his copy. Prior to work that morning, his right arm was “paining” him. TR 127. Mr. English did not do any typing on September 27, 1998, but he did have to write down the seal numbers on the containers as they passed through the gate. TR 70, 73.

Mr. English used both hands to rip the interchange out of the printer. TR 71, 130. He estimated that he performed this rip-and-tear activity about 600 to 700 times on September 27<sup>th</sup>, or about 40 times an hour. TR 72, 129. During cross-examination, he was shown his responses to Interrogatories propounded to him by Respondents, located at EX 14. He acknowledged that in his verified response to Interrogatory number 9, he stated that his job duties at Container on September 27<sup>th</sup>, required “constant and excessive use of the right and left hand, wrist and arm,

ripping and tearing interchanges.” TR 134-35. He also testified that the job required “continuous” ripping and tearing because his hands were in motion, one behind the other. TR 155.

He testified that at the end of his shift on September 27<sup>th</sup>, he was still having pain in both arms and hands, with the pain shooting through the arms, hands, and center of his hands. TR 132. The pain in his wrists continued while he was working on September 27, 1998. TR 160.

Mr. English testified that he went to Kaiser on September 28, 1998 and was examined by Dr. Gerber, who then sent him to Dr. Ishkanian, his treating physician. TR 84. Mr. English further testified that when he met with Dr. Ishkanian on September 28, 1998, Dr. Ishkanian told him he needed carpal tunnel surgery on his right hand. TR 48-49. However, this conflicts with his deposition testimony wherein he stated that on September 28, 1998, Dr. Ishkanian referred him to a “specialist to give me the electrical treatment to hook me up and see what the problem was.” EX 12, p. 389. According to his deposition testimony, shortly after he had the electrical tests done, he returned to Dr. Ishkanian, whereupon Dr. Ishkanian reviewed the results of the tests and told Mr. English that he had carpal tunnel syndrome in his right hand, scheduled surgery for it, and told him there were symptoms of carpal tunnel syndrome in his left hand, but that “it would be awhile before I have to have anything done with that.” EX 12, p. 390. Mr. English testified that Dr. Ishkanian told him carpal tunnel is usually caused by repetitive motion. TR 48. He does not have a report from Dr. Ishkanian saying that his carpal tunnel syndrome was related to work. TR 132. Mr. English testified that Dr. Ishkanian performed carpal tunnel surgery on his right hand on November 11, maybe in the year 1999.<sup>2</sup> TR 47. He continued to work after September 28, 1998, up until his surgery on November 11, 1998. During this period, he continued to have complaints in his right and left arm (TR 135), and had to take “stronger and stronger medicine (TR 137). Mr. English was temporarily totally disabled from November 9, 1998 until December 6, 1998. He thereafter resumed work on the waterfront as a marine clerk.

Mr. English testified that prior to the September 28, 1998 conversation with Dr. Ishkanian, no other physician at Kaiser had ever told him that he had carpal tunnel syndrome or that he needed an operation. TR 49. He said that September 28, 1998 was the first time he knew he was going to have surgery. TR 49. He added that prior to this conversation, “never in his life” did he have a diagnosis of carpal tunnel syndrome and had never heard the term before that day. TR 75, 108.

Mr. English testified that he had never lost time from work due to arthritis, and no physician at Kaiser had ever advised him to take time off work, nor did he lose wages due to problems with his wrists prior to September 26, 1998. TR 75. However, he sometimes turned down CFS jobs prior to September 26<sup>th</sup>, as these jobs involved lifting boxes, but he would still get another job. TR 76. Once Mr. English became a member of the Local 63, he also turned down MOD jobs, as these required opening heavy doors, and involved “too much wrist straining and

---

<sup>2</sup>The actual surgery occurred on November 11, 1998 at Kaiser Harbor City.

stuff.” TR 77-78. He testified that prior to September 26<sup>th</sup>, he had turned down each of these jobs about 5 to 6 times. TR 153.

Mr. English testified that Dr. Mahajan is an “arthritis specialist” who also was his doctor at Kaiser. He saw Dr. Mahajan about once, twice, or three times a year. TR 50.

Mr. English recalled being examined by Dr. John O’Hara, a physician recommended by Claimant’s counsel, on July 23, 1999 and has read his medical report of the same date. TR 79. He told Dr. O’Hara the complaints he was experiencing in July 1999 included tenderness at his surgical scar and a shooting pain in his right forearm. TR 80. He acknowledged completing a patient questionnaire when he saw Dr. O’Hara, located at EX 8, p. 215, and acknowledged that under the heading “present symptoms,” he failed to note any complaints in his left hand, left fingers, or left arm. TR 147. He also failed to indicate any problems with numbness or tingling in the right arm. TR 148.

Mr. English also recalled being examined by Dr. James London, who was retained by Respondents. At his first visit with Dr. London on February 8, 1999, Mr. English told him all the complaints he was having and did not recall whether he was having pain in his left arm at the time. TR 138. With respect to Dr. London’s November 23, 2000 report, he said it was true his job on September 27, 1998 required him to “rip and tear continuously” about 800 times, and that this “definitely” made his hands tired. TR 142. Mr. English testified that his hands were in pain but not yet tired before he started work on September 27, 1998. TR 142. He testified that he told Dr. London that the activity on September 27<sup>th</sup> “just aggravated the situation.” TR 142.

Mr. English claims that he still has shooting pain when he lifts weights, and his hands get overtired. TR 81. His right hand is more problematic than his left, and he has less grip in both hands than he did five years ago. TR 82. He currently takes Ibuprofen for his complaints. TR 83. He has not had any surgery to his left hand. He no longer has numbness in the tip of his right index finger. TR 138.

#### Dr. John O’Hara

Upon the recommendation of Mr. English’s attorney, Mr. English was examined by Dr. O’Hara once on July 23, 1999, and the doctor prepared two medical reports dated July 23, 1999 and March 5, 2000. CX 1. Dr. O’Hara obtained a history of injury consistent with that given by Mr. English at the trial. CX 1, p. 2. In the July 23<sup>rd</sup> report, Dr. O’Hara recorded complaints of tenderness at the site of the right surgery, “shooting pains in the right forearm and palm with lifting and grasping more than just a few pounds,” similar but less significant complaints in the left arm, bilateral wrist aching and stiffness, and bilateral decreased grip strength. CX 1, p. 3.

Dr. O’Hara testified at his deposition that he initially directed his examination to the right hand because “that was the area of primary complaint and the fact that he had had hand surgery there.” EX 18, p. 20. His findings included a longitudinal scar in his right palm consistent with an

open carpal tunnel decompression. CX 1, p. 4; EX 18, p. 20. Upon examination of the left hand, Dr. O'Hara found no evidence of carpal tunnel syndrome. CX 1, p. 4. He found limited motion of bilateral wrists. CX 1, p. 4. Based on x-rays, the doctor found his condition was indicative of "a longstanding inflammatory arthritis." CX 1, p. 5. He concluded that Mr. English had "bilateral radial carpal arthritis pre-existent and longstanding and aggravated by the longshoring work activity described," which produced Mr. English's symptoms of pain in the wrists. CX 1, pp. 6-7. Dr. O'Hara did not address the subsequent September 27, 1998 injury in his report except on the first page as a second date of injury. EX 18, p. 1. However, at his deposition, when asked about the "rip and tear" activities of September 27, 1998, he stated that it "definitely contributed." EX 18, p. 32:24. On cross-examination, he noted that the repetitive grasping and pulling activities superimposed on his activities on the 26<sup>th</sup> was a "perfect setup for continuing and worsening the symptomatology," which included pain, restriction of motion, and loss of grip strength. EX 18, p. 66.

Dr. O'Hara further testified that Mr. English's pre-existing symptoms of carpal tunnel syndrome were lit up and elevated by the work activity on the 26<sup>th</sup> of September and possibly the 27<sup>th</sup>. EX 18, p. 69. Later in cross-examination, when asked if surgery had been recommended prior to September 26<sup>th</sup>, Dr. O'Hara stated: "a competent orthopedic surgeon based on his clinical findings and the electrodiagnosis made the decision at that time. So, therefore, I would say the work injury of September 26 plus or minus, 27, was not the cause for this surgery." EX 18, p. 102. When asked if the claimant told him when he was first diagnosed with left carpal tunnel syndrome, the doctor responded, "I believe it was within the year before I saw him, though, within the year before he had his injury." EX 18, p. 80. Dr. O'Hara conceded that on his patient questionnaire, Mr. English failed to make any reference to the left upper extremity, left hand or left wrist. EX 18, p. 83.

Dr. O'Hara found Mr. English to be permanent and stationary at the time of the July 23, 1999 examination. He opined that Mr. English had an impairment of 24% of the right upper extremity and 24% of the left upper extremity due to loss of motion in each wrist. CX 1, p. 8. However, in an addendum report dated March 5, 2000, Dr. O'Hara re-evaluated his disability ratings "after certain anomalies were mentioned . . . in the Law Office of Diane Middleton." CX 1, p. 11. With no further explanation in the addendum report or his deposition testimony, Dr. O'Hara significantly reduced the impairment ratings to a loss of 11% of each upper extremity based solely on loss of motion. CX 1, pp. 11-12.

Dr. James London

Dr. London's testimony was taken via post-trial deposition on April 9, 2002. He first examined the claimant for the subject injury on February 8, 1999, and his report regarding this evaluation dated February 16, 1999 is located at EX 6. Dr. London testified that at the time of this examination, Mr. English reported that on September 26, 1998, he experienced pain in the radiovolar aspect of his right wrist (the undersurface of thumb), with pain radiating upon the radial aspect of the right forearm to the armpit area. Mr. English did not report having

experienced any complaints with respect to his right palm on September 26, 1998. LX 7. However, he did report that at the time of the examination, he had constant pain in the area of the scar from his prior carpal tunnel release surgery. Dr. London acknowledged that if Mr. English had not had the surgery, he would not have had the pain associated with the scar. LX 9. Furthermore, Dr. London testified that at the time of the evaluation, Mr. English did not report any injury or complaints in his left upper extremity, left hand, left wrist, or left fingers; thus, Dr. London did not examine the left upper extremity. LX 9, 11. Mr. English also did not discuss his work activities on September 27, 1998 at the time of his first examination. LX 16.

As set forth in his report, Dr. London acknowledged that Mr. English had a reduced range of motion in his right wrist, as well as an amputated right index finger. Dr. London testified that such an amputation would decrease a person's grip strength, but would not affect range of motion in the wrist. LX 11, 39. Examination also revealed light thumb muscle atrophy, but no weakness, slight swelling over the radial aspect of the right wrist, some arthritis in the base of the thumb, and decreased sensation of fine touch in the tip of the right long finger. LX 11.

Based upon his examination, Dr. London found that Mr. English had arthritis of the right wrist and hand, carpal tunnel syndrome that had been surgically treated, and degenerative arthritis in the base of his right thumb. He testified that the wrist arthritis was the result of a carpal instability with separation of the two bones in the wrist and that this longstanding carpal instability had led to the arthritis changes in the wrist, both of which, as well as the carpal tunnel, predated the claimant's work activities on September 26, 1998. LX 12.

Dr. London opined that Mr. English's work activities on September 26, 1998 did not cause any permanent worsening of his underlying condition based upon the following: Mr. English's medical records document he had symptoms in both wrists long before September 26, 1998, to include a history of arthritis in the hands as far back as 1982; x-rays in 1993 already showed degeneration of his carpal bones; x-rays in 1996 documented carpal instability as well as disruption of the radial carpal joints in both hands and wrists; records from Kaiser documented a markedly limited range of motion in both wrists by 1996 and evidence of inflammatory arthritis with secondary degenerative changes in the wrist; and a February 6, 1996 medical report documented a complete loss of radiocarpal joint space. LX 13.

Dr. London further testified that the prior medical records showed that Mr. English's arthritis had already progressed to a point where he had no remaining joint space, and bone spur formation described as severe degenerative joint disease. LX 13. Furthermore, a Kaiser physician noted on April 26, 1996 and August 6, 1996 that the claimant had significant bilateral loss of motion in the wrists. LX 13-14. Moreover, by March 6, 1998, Mr. English was noted to have paresthesia, an electrical feeling in his right thumb, middle, and ring fingers; synovitis in both hands with loss of range of motion; a positive Tinel's sign<sup>3</sup>; and a diagnosis of right carpal tunnel

---

<sup>3</sup>Dr. London testified that a positive Tinel's sign means that tapping over the medial nerve at the wrist caused electrical feelings into the medial nerve distribution of the hand, thumb, index, long, and ring fingers,

syndrome. LX 14. Nerve conduction testing performed on June 29, 1998 showed bilateral carpal tunnel syndrome with severe involvement in the right side, and thus Mr. English already had a carpal tunnel syndrome diagnosis three and six months prior to his work activities on September 26, 1998. LX 13-14. In fact, Dr. London noted that by September 10, 1998, a physician at Kaiser had already recommended that Mr. English be referred for carpal tunnel release surgery. LX 14. In sum, Dr. London testified that Mr. English already had all the conditions he presented with after working on September 26, 1998 prior thereto, to include a complete loss of bilateral wrist joint space, a severe conduction deficit on NCV testing, and a recommendation for carpal tunnel surgery. Dr. London testified that it was possible that Mr. English felt a little more symptomatic on September 26, 1998, but that his work activities on that day in no way contributed to any disability in his right wrist. LX 15. Rather, there was merely a temporary exacerbation of his pain symptoms which had resolved shortly thereafter, as discussed in his May 16, 2000 report. LX 15, 17, 34.

In that report, Dr. London addressed Dr. O'Hara's July 23, 1999 report. Dr. London agreed that Mr. English had permanent disability in his right wrist but felt that Mr. English's work activities on September 26, 1998 did not cause, aggravate, or increase any of this disability. LX 17. Dr. London further testified that none of Mr. English's disability in the right wrist is due to the carpal tunnel syndrome and is entirely due to the loss of range of motion in his right wrist. LX 17. He concluded that Mr. English had 11.5% impairment of the right upper extremity, but noted that it is more appropriately expressed as 12.5% of the hand. EX 6, p. 97; LX 43. He did not examine Mr. English with respect to his left upper extremity, but did comment in his report that the appropriate rating for the left arm, based on Dr. O'Hara's report would be 10% of the arm, more appropriately expressed as 11% of the hand. EX 6, p. 97; LX 43. He was of the opinion that Dr. O'Hara had rated permanent disability to the right and left wrists improperly under the AMA Guides. LX 21.

Dr. London also testified that his evaluation of the ratings in Dr. O'Hara's report is not a concession that Mr. English has permanent disability on an industrial basis. LX 54-55. During re-cross examination, Dr. London pointed out that Mr. English actually had a greater restriction in range of motion in his wrist prior to September 26, 1998 than when examined by a physician subsequent thereto. LX 57. Specifically, on January 25, 1996, Dr. Mahajan found that Mr. English's total range of motion at the wrist joints was 40 degrees, which was actually less than Dr. O'Hara's findings of a total range of motion of 75 degrees and Dr. London's examinations, which revealed a total range of motion of 75 and 95 degrees. LX 57.

Dr. London testified that Mr. English's arthritis was due to his carpal bones not being in the right position, which led to early wear and loss of arthritic cartilage, and this process progressed or "lit up" to a point prior to September 26, 1998, where he had no more cartilage between the carpal bones and distal radius. LX 29-30. Dr. London testified that this misalignment of the carpal bones could not have been caused by his use of bolt cutters on

---

which is a feeling patients describe as numbness or tingling. LX 15.



September 26, 1998, nor did his work on that day cause the carpal instability that led to arthritis. LX-30-31.

Dr. London disagreed with Dr. O'Hara's opinion that Mr. English's longshore activities aggravated pre-existing bilateral radiocarpal arthritis, as Mr. English had already worn away his articular cartilage over the past decade, and thus, it is not possible to aggravate it, as you "can't wear away something that isn't there anymore." LX 31. Dr. London testified his opinion would not change even if the claimant had been lifting bolt cutters weighing 50 to 60 pounds on September 26, 1998, at least 80 to 100 times, and this activity put stress on his hands and wrists. LX 34.

Thereafter, Dr. London examined Mr. English's left upper extremity on October 23, 2000, and his report, dated November 5, 2000, is located at EX 6, p. 110-A. At the time of this examination, Mr. English related that on September 27, 1998, he was working a gate job where he had to rip forms and give a copy of the form to truckers as they passed through his gate, and he repeated this activity 800 times. He added that "he felt like his hands had gotten tired while he was doing that activity and described it as aggravating the situation." LX 23. He also reported complaints of intermittent pain in his left palm radiating upon the forearm to the armpit, but no numbness and tingling in the left wrist or hand, and pain while doing "rip and tear" jobs. LX 23-24.

Dr. London's examination of the left wrist revealed reduced range of motion, expected in a person with his pre-existing history of arthritis, as well as reduced grip strength in the right hand. EX 110c. However, Dr. London had previously examined Mr. English on December 19, 1991, in connection with a prior industrial injury, at which time he already had evidence of reduced grip strength on the right side. EX 17, p. 535; LX 26. Dr. London testified that his grip strength measurements in 1991 were "remarkably similar" to the measurements he obtained at the time of his examination on October 23, 2000, such that Mr. English's current loss of grip strength was basically the same in 1991. LX 53.

Dr. London further acknowledged that he authored a supplemental report dated December 18, 2000, after reviewing Mr. English's deposition testimony which included his sworn testimony regarding his job duties on September 27, 1998. LX 50. Dr. London testified that based thereon, if a finder-of-fact should determine that Mr. English's work activities on September 26, 1998 aggravated or worsened pre-existing conditions in his right wrist, then it is his opinion that his subsequent work activities on September 27, 1998 also aggravated and worsened pre-existing conditions in his right wrist. LX 27. Dr. London testified that the basis for this opinion is that the work activities of September 27, 1998 that Mr. English described to him, ripping and tearing 800 forms, would logically have to be considered an aggravating factor.

Dr. London testified his opinion would not change were the claimant to have only torn 600 forms on September 27, 1998, or if the paper were perforated or 6 inches by 3½ inches in size. LX 28.

Kurt Ruhland

From April of 1998 through June of 1999, Mr. Ruhland served as assistant manager of rail operations. RX 6. Thus, this was his position at the time of the subject September 26, 1998 injury. Mr. Ruhland was familiar with the claimant. RX 8. Mr. Ruhland's testimony was taken post-trial via deposition on April 9, 2002.

As assistant manager of rail operations for Maersk, Mr. Ruhland had the opportunity to supervise the facility at Dock 270. RX 9. He was familiar with the job classification of a DST clerk at Dock 270 in September of 1998 although Mr. Ruhland did not have any responsibility for direct supervision of hourly longshore workers other than ensuring that they were conducting or carrying out their job in a safe manner. RX 26, 31. He testified that the DST marine clerk position is responsible for ensuring that containers are discharged in the correct manner. He said that a DST clerk may also be responsible for ensuring that containers coming from a train are located in the correct place in the container yard, or also ensuring that the correct containers being discharged are picked up and moved expeditiously to the train. RX 9-11.

Mr. Ruhland testified that in September of 1998, another duty of a DST clerk for Maersk may have been to clip or take off old seals from a container that was taken off a train, and then put on new Maersk security seals before the container is loaded for transport. The DST clerk would also have to record the new seal number. RX 11-12.

Mr. Ruhland agreed with Mr. English's prior trial testimony that some of the seals he would have been clipping at Maersk on September 26, 1998 were about three inches long, with a bottom part and top shaft that locked together, in effect, a steel rod about the thickness of a middle finger extending into a steel holder that could only be separated by cutting. RX 13.

However, Mr. Ruhland testified that in September of 1998, not all of the containers that a DST clerk would have had to put on a new Maersk seal had this type of old seal on them. RX 14. He testified there were other types of seals: a flimsy "band seal" about 3/8 of an inch that does not provide a barrier for opening the container, and a similar seal made of plastic. RX 15. He said that "it's a very small percentage of the containers that were coming off the train that would have those bolt seals." RX 15. Furthermore, he testified that neither the band seal nor the plastic seal needs to be cut to insert the new Maersk seal. He said that some containers come in with no seals at all, and some containers already come in with a Maersk seal. RX 17. He further stated that many of the shippers/customers prefer not to have their seals cut off, and clerks are instructed to avoid cutting the seal if possible. RX 18.

Based upon his experience, Mr. Ruhland testified that in September of 1998, the heaviest volume of containers encountered by a DST clerk on one day would be 200 containers. Of these 200 containers, approximately 20%, or 40 containers, would require the old security seal to be cut off by bolt cutters. Of the 40 containers, only 10 would have the thicker steel seal. RX 19. Mr. Ruhland testified it would be rare for as many as 200 containers to flow through one clerk, and this was his “high side” estimate. RX 32. Mr. Ruhland disagreed with Mr. English’s testimony that while working as a DST clerk on September 26, 1998, he would have clipped steel seals 80 to 100 times. RX 23.

Mr. Ruhland testified that in September of 1998, Maersk maintained three bolt cutters: a 42 inch set, the largest; a 36 inch set; and a smaller set, either 24 or 30 inches in length. RX 20. Mr. Ruhland was advised that during trial, Mr. English testified that he used the largest set of bolt cutters on September 26<sup>th</sup>, which he estimated weighed at least 50 to 60 pounds. Mr. Ruhland disagreed with this statement and testified that the largest bolt cutter weighed 18 pounds, and the smaller sets in September of 1998 weighed about 15 and 12 pounds. RX 21-22.

Mr. Ruhland testified that as part of his job as assistant manager for rail operations, he was responsible for purchasing or arranging for the purchase of bolt cutters, and the cutters were purchased from the Grainger equipment catalog. According to page 1318 of the Grainger catalog, the 42 inch bolt cutters weigh 18 pounds. RX 24. The catalog does not list any bolt cutters larger than 42 inches. RX 22-24. To his knowledge, Maersk has never ordered bolt cutters from anywhere but the Grainger catalog. RX 24. It should be noted that the excerpts from the Grainger catalog submitted into evidence do not provide the catalog’s date of publishing.

#### Kaiser Medical Records

The Kaiser records were offered into evidence by Maersk to show that Mr. English’s carpal tunnel syndrome and arthritis pre-existed his work activities on September 26, 1998 and to rebut the claimant’s testimony that he was not diagnosed with carpal tunnel syndrome until September 28, 1998, which was after his work on September 26th. Specifically, the records reflect that bilateral carpal tunnel syndrome (CTS) with severe right-side CTS was diagnosed on June 29, 1998 upon a referral by Dr. Mahajan May 15, 1998. EX 7, p. 129. On July 6, 1998, Dr. Mahajan again noted right-side CTS, and an orthopedic surgeon referral for carpal tunnel release. EX 7, p. 128. On September 8, 1998, Dr. Alan Gerber noted bilateral carpal tunnel syndrome and that surgical intervention would be offered. EX 7, p. 127. Dr. Mahajan again indicated severe right-side CTS and made an orthopedic surgeon referral on September 10, 1998. EX 7, p. 126. On September 28, 1998 at 9:30a.m., Mr. English was examined by Dr. Ishkanian upon Dr. Mahajan’s September 10, 1998 referral. On September 28, Dr. Ishkanian scheduled right-hand CTS surgery for November 11, 1998. EX 125. His notes indicate that nerve conduction studies confirm severe right-side CTS and that CTS surgery on the right side was needed “ASAP.” EX 7, p. 125.

## Findings of Fact and Conclusions of Law

### Injury

Coverage under the Act is presumed by Section 20(a) in the absence of substantial evidence to the contrary. *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 959 (9th Cir. 1998). To establish the presumption, the “claimant need only show that he sustained physical harm and that conditions existed at work which could have caused the injury.” *Id.* at 959 (citing *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149, 154 (1986)).

Once established, the Section 20(a) presumption may be overcome “only by evidence specific and comprehensive enough to sever the potential connection between the disability and the work environment.” *Parson Corp. v. Director, OWCP*, 619 F.2d 38, 41 (9th Cir. 1980). Such specific evidence includes a physician’s unequivocal statement, to a reasonable degree of medical certainty, that the claimant’s injury is not related to his employment. *O’Kelley v. Department of the Army/NAF*, 34 BRBS 35, 41-42 (2000).

In support of his position, Mr. English presented the reports of Dr. O’Hara. He concluded that Mr. English had pre-existing bilateral radial carpal arthritis which was aggravated by his work activity on September 26, 1998 which produced Mr. English’s symptoms of pain in his wrists. CX 1, p. 6-7. This evidence establishes that Mr. English sustained an injury which could have arisen from his employment at Maersk. As Mr. English has met his burden of establishing that his employment could have caused/aggravated his wrist condition, he has invoked the Section 20(a) presumption.

In rebuttal, Respondents presented the reports and testimony of Dr. London, who unequivocally denied that Mr. English’s wrist condition was related to his employment. Regarding Mr. English’s right wrist, Dr. London stated:

Mr. English is alleging that he had increased pain in his right wrist with increased numbness in the right long and ring fingers on 9/26/98 when he operated a bolt cutter at work. In my opinion, that incident was an exacerbation of pre-existing arthritis in his right wrist with secondary synovitis and secondary carpal tunnel syndrome. In my opinion, Mr. English did not sustain any permanent worsening of his pre-existing right wrist degenerative conditions as a result of his work activities on 9/26/98 . . . .

EX 6, p. 109. With respect to the left wrist, Dr. London concluded:

[W]hen Mr. English was evaluated in my office on 2/8/99, he expressed no symptoms referable to his left upper extremity. He does have pre-existing, erosive arthritis in his left wrist as documented in his Kaiser medical records and

summarized in my 2/16/99 report. This is not due to, nor was it aggravated by his work activities on 9/26/98.

EX 6, p. 97.

By presenting an unequivocal medical opinion denying causation, Maersk succeeded in rebutting the Section 20(a) presumption, so Mr. English can prevail only if the weight of the evidence supports his position. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 276, 281 (1994); *Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18, 20 (1995); *Hislop v. Marine Terminals Corp.*, 14 BRBS 927, 931 (1982).

#### Injury Arising Out of and in the Course of Employment

The threshold issue is whether Mr. English sustained an injury to his right and/or left upper extremity as a result of his employment with Maersk on September 26, 1998. Mr. English alleges both a specific injury and an occupational disease based on cumulative trauma. Where either employment conditions or a work-related accident aggravates, accelerates or combines with a pre-existing “harm” or pain, the entire resultant disability is compensable. *Independent Stevedore Company v. O’Leary*, 357 F.2d 812 (9<sup>th</sup> Cir. 1966); *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986). In occupational disease cases in which the condition does not immediately result in disability, there is no “injury” until the accumulated effects of the harmful activities manifest themselves and the claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should become aware, of the relationship between the employment, the disease and the disability. *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955); *Thorud v. Brady-Hamilton Stevedore Company, et al.*, 18 BRBS 232 (1987); *Geisler v. Columbia Asbestos, Inc.*, 14 BRBS 794 (1981). However, because timely notice was given in the instant case, the distinction between traumatic injury and occupational disease is legally inconsequential.

The crux of Maersk’s position is that Mr. English did not sustain an injury on September 26, 1998 that combined with, worsened, or permanently aggravated his pre-existing arthritis and carpal tunnel condition based on the extensive Kaiser records and Dr. London’s opinion. However, if an injury is found to have significantly contributed to the pre-existing condition, Maersk avers that it was not the last responsible employer because Mr. English engaged in repetitive and continuous activities on September 27, 1998 while working for Container Stevedoring. Doctors O’Hara and London essentially agree on extent of disability at roughly 11 to 11.5% of the right upper extremity and 10-11% of the left upper extremity. Their main conflict of opinion lies in whether the claimant’s injuries on September 26 and 27, 1998 permanently aggravated his pre-existing arthritis and carpal tunnel condition or merely temporarily exacerbated symptoms which were resolved shortly thereafter. I credit Dr. London’s view and conclude that Mr. English did not sustain a compensable specific injury on September 26, 1998 that aggravated, accelerated, or combined with his pre-existing condition, with respect to his upper left or upper right extremity for the following reasons.

Under *Amos v. Director, OWCP*, 32 BRBS 144 (CRT) (9<sup>th</sup> Cir. 1999), the treating physician is entitled to special deference. In the instant case, neither Dr. O'Hara nor Dr. London were the treating doctors; rather, Mr. English stipulated that the Kaiser doctors treated him. TR 27. On December 31, 1998, Dr. Ishkanian signed a doctor's certificate on behalf of Mr. English indicating his diagnosis of Mr. English's condition as carpal tunnel syndrome, and further indicated in response to question number 26, that this disability is *not* the result of "occupation" either as an "industrial accident" or as an "occupational disease." EX 7, p. 111. Pursuant to *Amos*, I give this opinion special deference. Moreover, in reviewing Mr. English's records from Kaiser, which pre-date and post-date September 26, 1998 (EX 4, 7), it is apparent that not one examining physician indicated that Mr. English's upper extremity conditions were related to his employment. This includes both Dr. Mahajan, the claimant's "arthritis specialist," as well as Dr. Ishkanian, the surgeon who performed his right carpal tunnel surgery.

Furthermore, I find the opinions of Dr. London to be more persuasive than those of Dr. O'Hara. First, it is quite apparent that Dr. London undertook a far more thorough review of Mr. English's prior records from Kaiser than did Dr. O'Hara, and he also reviewed Mr. English's deposition transcript. For example, based upon Dr. O'Hara's July 23, 1999 report, it does not even appear that he reviewed Mr. English's Kaiser records in the months pre-dating September 26, 1998 (EX 8, p. 170), to include the reports evidencing complaints of daily right hand numbness and pain less than three weeks before September 26, 1998, as well as records evidencing that right carpal tunnel release was recommended prior to September 26, 1998. Furthermore, Dr. O'Hara testified that he was not even aware of the numbers regarding Mr. English's prior loss of bilateral wrist motion (EX 18, p. 551), apparently an important factor in determining whether he sustained a permanent aggravation or worsening of pre-existing conditions on September 26, 1998. Dr. O'Hara even acknowledged that such information would be helpful to him in determining whether Mr. English's current loss of motion was due to preexisting conditions or aggravation caused by his work on September 26, 1998. EX 18, p. 550.

Dr. London had the opportunity to examine Mr. English on two occasions, to include an examination in closer proximity to the alleged date of injury than that of Dr. O'Hara. Moreover, Dr. London examined Mr. English with respect to a prior right upper extremity injury in 1990 and thus was able to orthopedically evaluate his condition prior to September 26, 1998, unlike Dr. O'Hara.

Dr. O'Hara is of the opinion that Mr. English's employment activities on September 26, 1998 caused a permanent aggravation of pre-existing symptoms in his bilateral upper extremities. However, I find the bases for his conclusions in this regard to be so seriously flawed as to render his opinion discredited. At the onset of his deposition, Dr. O'Hara testified that a person can have a diagnosis of degenerative arthritis for many years and not even be aware of it with respect to symptoms, but then a traumatic incident "lights up" the condition. EX 18, p. 542. However, there is no doubt from a review of the Kaiser records, coupled with Mr. English's own testimony, that he was clearly symptomatic in his bilateral extremities prior to using bolt cutters on September 26, 1998. EX 4, 7.

When asked to provide the basis for his opinion that Mr. English sustained a permanent aggravation of pre-existing bilateral radiocarpal arthritis on September 26, 1998, Dr. O'Hara testified he found that during his examination, Mr. English had symptoms in his wrists he had not had prior to September 26, 1998. He also testified that Mr. English did not seem to be "bothered much" by his complaints prior to September 26, 1998, and was working "without awareness of any problems in his wrists." EX 18, p. 544, 546.

This is of course clearly contradicted by the Kaiser records, which document his longstanding prior history of complaints of wrist pain, swelling, reduced range of motion, escalating to complaints of daily right hand pain and numbness in the weeks prior to September 26, 1998. EX 7, pp. 125, 126, 127, 128, 130, 135, 136, 139, 140. Moreover, the Kaiser records document that prior to September 26<sup>th</sup>, Mr. English's condition had been treated with injections, pain medication to include Vicodin, and ultimately a surgical referral. EX 7, pp. 131, 133, 135, 137. However, Dr. O'Hara testified he was not aware that Mr. English was prescribed Vicodin or that Kaiser made any recommendation for right carpal tunnel surgery prior to September 26, 1998. EX 18, pp. 550-51. Dr. O'Hara also admitted that he did not really delve in Mr. English's actual complaints prior to September 26, 1998. EX 18, p. 551.

Furthermore, Mr. English testified that prior to September 26, 1998, he was already turning down two types of marine clerk jobs due to problems with his wrists and hands, of which Dr. O'Hara was apparently unaware. The record also contains May 12, 1998 correspondence from Dr. Mahajan wherein the physician finds that Mr. English experienced flare-ups of arthritis and that he was unable to work during the flare-ups due to pain, stiffness, and swelling in his joints, which contradicts Mr. English's testimony that he never missed work for his wrist condition prior to September 26, 1998. EX 9, p. 218; TR 75. It is apparent that Dr. O'Hara did not have a clear understanding of the extent of Mr. English's prior condition; thus, the basis for his opinion that Mr. English's work on September 26, 1998 was an aggravation is seriously undermined.

Dr. O'Hara also testified that he initially felt the need for Mr. English's right carpal tunnel release was due at least in part to his work activities on September 26<sup>th</sup>. However, as noted above, at the time of his examination, Dr. O'Hara was unaware that Mr. English's November 11, 1998 right carpal tunnel surgery had actually been recommended and even scheduled prior to September 26, 1998, despite having allegedly reviewed prior Kaiser records. Once this was brought to Dr. O'Hara's attention, he testified that his opinion that surgery was due to Mr. English's work on September 26<sup>th</sup> would change. Thus, it would appear that Mr. English's work on September 26, 1998 was not the cause for surgery, and if he needed surgery, he would have needed it whether or not he worked September 26<sup>th</sup> or the 27<sup>th</sup>. EX 18, p. 562-63.

On the other hand, I find the opinions of Dr. London, as set forth in his medical reports and post-trial testimony, to be better reasoned and based upon a more thorough review of Mr. English's prior medical condition. During his deposition, Dr. London testified that Mr. English suffered from pre-existing bilateral carpal tunnel syndrome and carpal instability with secondary arthritis. LX 12. Dr. London is also of the opinion that Mr. English did not sustain any

permanent aggravation or worsening of his condition as a result of his employment on September 26, 1998, and specifically, the use of the bolt cutters. LX 13.

The basis for Dr. London's opinion is set forth throughout his reports; however, the most succinct yet comprehensive summary of his bases is set forth on pages 13 through 15 of his deposition. During the deposition, Dr. London testified that his opinion is supported by the Kaiser records, evidencing that Mr. English had a complete loss of radiocarpal joint space in both wrists by 1997; a diagnosis of right carpal tunnel syndrome by March 6, 1998; EMG-NCV evidence of bilateral carpal tunnel syndrom with severe involvement on the right side by June 29, 1998; and a surgical recommendation prior to September 26, 1998. LX 13-15. With respect to the loss of joint space, as Dr. London simply put it: "you can't wear away something that isn't there anymore." LX 31. Furthermore, Dr. London also acknowledged that by September 9, 1998, less than three weeks prior to the alleged date of injury, Mr. English was reporting numbness and daily aching in his right hand.

However, perhaps the most important evidence bearing on whether Mr. English sustained a permanent aggravation or worsening of his underlying condition is a comparison of his actual disability prior and subsequent to September 26, 1998. As discussed herein, Dr. O'Hara testified that his permanent disability rating is based solely on loss of range of motion, and Dr. London agrees that any permanent disability in Mr. English's hands/wrists is due to loss of range of motion. LX 18. Furthermore, Dr. O'Hara was under the erroneous belief that the Kaiser records did not contain any actual numbers with respect to Mr. English's prior loss of motion in the wrists. As Dr. London testified, the Kaiser records unequivocally document that Mr. English had a restricted range of motion in his right wrist prior to September 26, 1998. LX 18; EX 7.

Unknown to Dr. O'Hara, the Kaiser records also contain the actual measurements as to this prior loss of range of motion. Specifically, during his deposition, Dr. London pointed out that according to the January 25, 1996 report of Dr. Mahajan, Mr. English was found to have a markedly limited range of motion in the bilateral wrist joints of 40 degrees. Dr. London testified that this finding is actually more of a restriction than what Dr. O'Hara found at the time of his July 23, 1999 examination, which was 75 degrees. Furthermore, Dr. Mahajan's range of motion findings were more reduced than Dr. London's findings at the time of both his post-September 26, 1998 examination, which revealed 75 degrees and 95 degrees. LX 57-58. Dr. London testified that this shows that Mr. English "had a greater restriction of motion in his wrists prior to September 26, 1998 than he did by any examiner afterward." LX 58.

Moreover, when Dr. London had the opportunity to evaluate Mr. English in 1991 in conjunction with a prior right upper extremity injury (report regarding this evaluation located at EX 17), his examination revealed that Mr. English had evidence of a right grip loss already in 1991. LX 25-26. Dr. London also noted that Mr. English's previously amputated right index finger would reduce his grip strength in that hand. LX 11. In fact, Dr. London testified that Mr.



English's grip strength in 1991 was remarkably similar to his post-September 26, 1998 grip loss, and was basically the same in 1991 as it was at the time of his October 23, 2000 examination. LX 53.

I find the above to be persuasive evidence with respect to determining whether Mr. English sustained a permanent aggravation or worsening of pre-existing conditions as a result of his employment on September 26, 1998. Accordingly, while Mr. English may very well have felt some more pain on September 26, 1998, including pain in the palms, I find that there was no permanent aggravation or worsening of his condition.

I further find that Mr. English has failed to prove that his left upper extremity complaints are related to his employment activities at Maersk on September 26, 1998. In addition to the reasons set forth above in addressing the alleged right upper extremity injury, incorporated herein, I would also note that the Kaiser records clearly document that Mr. English was also symptomatic with respect to the left wrist and hand prior to September 26, 1998, complaining of swelling, pain, loss of range of motion, and even having undergone at least one left wrist injection in an attempt to alleviate his complaints. EX 7.

During the trial, Mr. English testified that he experienced complaints in his left upper extremities following his use of the bolt cutters on September 26, 1998. TR 60-61. However, the reports of both Dr. O'Hara and Dr. London fail to note Mr. English reporting any left upper extremity complaints following his employment activities on September 26<sup>th</sup> aside from decreased grip strength. CX 1, p. 3.

With respect to Dr. London, Mr. English was first evaluated on February 8, 1999. However, when describing for the doctor his complaints after using the bolt cutters on September 26, 1998, Mr. English failed to make any reference whatsoever as to experiencing left upper extremity complaints. Furthermore, Mr. English failed to report any current complaints in his left fingers, arm, or hand as of the time of the February 8, 1999 examination. EX 6, pp. 99-100. Accordingly, during his deposition, Dr. London testified that he did not examine Mr. English's left upper extremity at this time, as he did not indicate having sustained any injury to his left upper extremity. LX 9. In a May 16, 2000 supplemental report, Dr. London also acknowledged Mr. English's failure to report any left upper extremity complaints at the time of the initial examination. EX 6, p. 97.

Moreover, when subsequently seen by Dr. O'Hara on July 23, 1999, under the heading "Present Complaints," the doctor indicated zero complaints regarding his left upper extremity. EX 8, p. 160. Dr. O'Hara's deposition testimony acknowledged the same. EX 18, p. 560. Dr. O'Hara's chart notes and narrative report also contain a heading "History of Present Injury" which recorded Mr. English's alleged right-side symptoms while working with the bolt cutters on September 26, 1998, but failed to mention any left-sided complaints. EX 8, p. 159; CX 1, p. 2;

EX 8, p. 167. Furthermore, Dr. O'Hara also acknowledged that his examination of Mr. English's left hand failed to reveal any presence of carpal tunnel syndrome. CX 1, p. 4. Mr. English's Patient Questionnaire also did not indicate any complaints in his left hand, fingers or arm, which he acknowledged at trial. EX 8, p. 215; TR 146-47.

Despite the paucity of left-sided complaints following September 26, 1998 and at the time of his July 23, 1999 examination, Dr. O'Hara was still of the opinion that Mr. English's work activities aggravated pre-existing conditions in the left hand and wrist. I find this opinion not persuasive in light of Dr. O'Hara's purported basis for it. Dr. O'Hara testified this opinion is based in part on his finding that Mr. English still had symptoms in his wrists on July 23, 1999 that he had not had prior to September 26, 1998. EX 18, p. 544. However, Dr. O'Hara seems to overlook the fact, which he acknowledged later during the deposition, that Mr. English had no left upper extremity complaints at the time of his examination. Furthermore, Dr. O'Hara seems to overlook the fact that the Kaiser records clearly document that Mr. English's left wrist was symptomatic prior to September 26, 1998, to include complaints of pain, loss of range of motion, and swelling, which required treatment through medication and an injection to the left wrist. Dr. O'Hara acknowledges that he had no idea the extent of Mr. English's prior range of motion loss, and that this information would be helpful in determining what degree of disability Mr. English had prior to September 26, 1998. EX 18, pp. 549-50.

Based upon the above, I find the opinions and findings of Dr. London should be credited over those of Dr. O'Hara. Whereas Dr. O'Hara failed to address pertinent prior medical reports from Kaiser, Dr. London performed a more thorough review of Mr. English's medical history, to include his upper extremity condition as far back as his examination in 1991. Furthermore, Dr. London's opinions are more comprehensive, well-reasoned and supported by the medical rationale; whereas the bases for Dr. O'Hara's opinions as to aggravation are flawed and/or inconsistent. Dr. London's opinions are further supported by those of Mr. English's treating physicians, who failed to ever attribute his bilateral wrist/hand condition to employment, and even ruled out industrial causation in one report. The overwhelming weight of the credible medical evidence supports a finding that Mr. English's employment with Maersk did not cause, aggravate, or worsen his right upper extremity condition based on a specific injury occurring on September 28, 1998.

## **ORDER**

Accordingly:

1. Claimant's claim for permanent disability benefits under the Longshore Act is DENIED;

2. Claimant's claim for past and future medical benefits under § 7 of the Longshore Act is DENIED;
3. Claimant's request for attorney's fees and costs is DENIED.

A

ALEXANDER KARST  
Administrative Law Judge

AK:sp